



**STATE BOARD OF EQUALIZATION**

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*Executive Director*

March 22, 1996

Mr. M--- M. O---  
Senior Manager  
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XX --- --- Avenue, Suite XXX  
---, Arizona XXXXX

Re: Ruling Request Concerning Sales and Use Tax Nexus

Dear Mr. O---:

This is in response to your request for ruling dated January 17, 1996 regarding sales and use tax nexus. Initially I note that Board staff does not issue "rulings." The only basis for relief when a person fails to pay tax otherwise due is under Revenue and Taxation Code section 6596, which only applies when that person has reasonably relied on a written opinion from the Board issued to the taxpayer in response to a written request that includes all relevant information, including the identity of the taxpayer. Since your client is not identified, this opinion does not come within the provisions of section 6596.

You state that the taxpayer develops and publishes software. It directly markets the software it develops as well as software developed by others. As part of these efforts, the taxpayer holds five or six trade shows in California per year. These trade shows generally last from one-half to two days, and the purpose is so that the taxpayer can demonstrate the products it sells. The taxpayer does not enter into actual contracts for sales during the trade shows, nor does it take deposits for sales. You state:

“The taxpayer solicits sales over the telephone and these telephone calls are made from outside [California]. No local advertising is conducted by the taxpayer, nor does the taxpayer solicit sales by catalog or flyer. The product is sent directly to the purchaser by common carrier or mail and all inventory is located outside [California]. Furthermore, the taxpayer does not perform installation and any technical assistance that is provided is accomplished over the telephone by persons located outside [California]. The taxpayer does not have any of the following in your state: resident employees; telephone directory listing; business licenses; bank accounts; office or other place of business. In addition, the taxpayer does not own any real or personal property located within your state, whether or not rented or leased to a customer. Finally, the taxpayer does not have sales people that are assigned to a territory, however, a sales person may, on rare occasions, visit a potential customer within your state. No sale is ever consummated on such visits and orders are not approved within your state.”

Any retailer who is engaged in business in California is required to collect the applicable use tax from its purchasers and remit that tax to the Board. (Rev. & Tax. Code § 6203.) The definition of “retailer engaged in business” in California relevant here is set forth in subdivision (b) of section 6203:

“Any retailer having any representative, agent, salesperson, canvasser, independent contractor, or solicitor operating in this state under the authority of the retailer or its subsidiary for the purpose of selling, delivering, installing, assembling, or the taking of orders for any tangible personal property.”

The taxpayer clearly has representatives, agents, or salespersons entering California. Thus, the only remaining issue is whether those persons are entering this state for a purpose listed in the provision quoted above. The phrase “for the purpose of selling” as used in this provision is not limited to entering into the actual contract of sale. Such an interpretation would lead to the absurd result that a person could avoid its use tax collection duties, even though physically entering this state for the specific purpose of obtaining and maintaining a market for the sale of tangible personal property, by simply refusing to take actual orders while here, and instead exchanging telephone numbers with its customers so that the final act of consummating the contract of sale is done outside the state. Rather, logic and the actual wording used by the statute show that a person is a retailer engaged in business in California within the meaning of subdivision (b) of section 6203 when it enters this state in order to obtain, maintain, or enlarge its market in California for sales of tangible personal property. That is, if a retailer enters this state to engage in a selling activity, it is engaged in business in this state. I note that this application of subdivision (b) of section 6203 is consistent with Supreme Court decisions holding that a physical presence in the taxing state for the purpose of maintaining the taxpayer’s market constitutes nexus.

In the facts you describe, the taxpayer will be entering the state in order to make sales. The fact that the taxpayer may refuse to accept orders for software is irrelevant. It is holding the trade shows for the specific purpose of making sales of tangible personal property. That is, it is entering California for the purpose of selling. It is a retailer engaged in business in this state within the meaning of section 6203. It appears also that the taxpayer's sales persons entering this state to "visit" potential customers is also to obtain, maintain, or enlarge its market in California. This would be an additional basis for regarding the taxpayer as engaged in business in California for the same reasons discussed above.

Under the facts stated in your letter, your client must register with California, collect the applicable use tax from its customers, and remit that tax to the Board. It should contact District Principal Compliance Supervisor John Gibbs at (916) 322-1871 or P.O. Box 188268, Sacramento, CA 95818-0268 to arrange for registration. If you have further questions, feel free to write again.

Sincerely,

David H. Levine  
Supervising Staff Counsel

DHL/cmm

cc: Mr. Dennis Fox (MIC:92)  
Out-of-State District Administrator (OH)  
Mr. John Gibbs (OH)  
Ms. Kelly Ching (MIC:82)